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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS GILBERT PANDO,

Defendant and Appellant.

G051834

(Super. Ct. No. 08NF1773)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed as modified.

Dennis P. O'Connell for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Kristine A. Gutierrez, Deputy Attorneys General for Plaintiff and Respondent.

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Defendant Thomas Gilbert Pando stole valuable gems and other items from a holder of a safe deposit box at a bank. A jury found Pando guilty of grand theft. After conducting hearings regarding the value of the stolen property, the trial court ordered Pando to pay \$750,192 in victim restitution. Of that total, the court directed Pando to pay \$400,000 to the bank because it had earlier reimbursed the holder of the safe deposit box in that amount for his loss. Pando is appealing from the restitution order.

We find that the restitution order is supported by substantial evidence. But we also find that the trial court improperly included the bank in the restitution award because it was not a “direct victim” of Pando’s theft. Therefore, we will order the court to modify the restitution award so that Pando will be directed to pay the entire \$750,192 exclusively to the “direct victim” of Pando’s theft, the holder of the safe deposit box.

I

FACTUAL AND PROCEDURAL BACKGROUND

In April 2008, Pando stole numerous items from W. Johnson’s safe deposit box located in Sanwa Bank (later called Bank of the West). Pando had once rented the same safe deposit box, but he had kept his key and the bank never changed the lock. Johnson estimated the value of his stolen property (coins, jewelry, and gems) at over \$750,000. Bank of the West reimbursed Johnson \$400,000.

In May 2010, a jury found Pando guilty of grand theft: unlawfully taking personal property belonging to Johnson, which had a value exceeding \$400. (Pen. Code, 487, subd. (a).)¹ The jury found not true a sentencing allegation that the value of the property exceeded \$200,000. (§ 12022.6, subd. (a)(2).)²

¹ Further undesignated statutory references will be to the Penal Code.

² “If the loss exceeds two hundred thousand dollars (\$200,000), the court, in addition and consecutive to the punishment prescribed . . . shall impose an additional term of two years.” (§ 12022.6, subd. (a)(2).)

In June 2010, the trial court granted Pando three years of formal probation with various terms and conditions, including 270 days in jail.³ As an additional condition of probation, the court ordered Pando to pay restitution in an amount to be determined by the probation officer.

In February 2013, the probation officer filed a report recommending victim restitution in the amount of \$750,192. The officer also recommended that probation be extended an additional two years. Four months later, the trial court extended Pando's probation by two years to June 2015.⁴

In February 2015, after conducting contested restitution hearings over several days, the trial court agreed with the probation department's recommendation and ordered Pando to pay \$750,192 in victim restitution to Johnson and Bank of the West (\$400,000 of the total). Bank of the West had not appeared at any of the restitution hearings. Pando filed a timely notice of appeal from the restitution order.⁵

II

DISCUSSION

Pando contends that: 1) the trial court's \$750,192 restitution award was unsupported by substantial evidence; and 2) Bank of the West should not have been included in the restitution award. We shall address each contention in turn.

³ We affirmed the judgment of conviction in an earlier appeal. (*People v. Pando* (Apr. 25, 2011, G043811) [nonpub. opn.])

⁴ An order extending probation is ordinarily appealable. (See *People v. Theobald* (1964) 231 Cal.App.2d 351, 353.) But the time to appeal this order has long passed. (See Cal. Rules of Court, rule 8.104.) Thus, we lack jurisdiction to consider Pando's claims of error regarding the extension. (See *In re Horowitz* (1949) 33 Cal.2d 534, 537.)

⁵ An indeterminate restitution award ordered as a condition of probation becomes appealable at the point when the trial court fixes the amount. (*People v. Vournazos* (1988) 198 Cal.App.3d 948, 953.)

A. Substantial Evidence Supports the Restitution Award

“Restitution is constitutionally and statutorily mandated in California. [Citations.]” (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045; Cal. Const., art. I, § 28; § 1202.4.) Section 1202.4, subdivision (f), provides in relevant part: “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim . . . or any other showing to the court.”

“‘The burden is on the party seeking restitution to provide an adequate factual basis for the claim.’” (*People v. Jessee* (2013) 222 Cal.App.4th 501, 506, quoting *People v. Giordano* (2007) 42 Cal.4th 644, 664 (*Giordano*).) “‘The standard of proof at a restitution hearing is preponderance of the evidence, not reasonable doubt.’ [Citation.] Once the prosecution has made a prima facie showing of the victim’s loss, ‘the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.’ [Citation.] [¶] On appeal, we review a restitution award for abuse of discretion. [Citations.] The award must be supported by sufficient evidence under the substantial evidence standard of review. [Citations.] ‘We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.’ [Citation.]” (*People v. Jessee, supra*, 222 Cal.App.4th at pp. 506-507.)

“[I]t is well settled that ‘statements by the victims of the crimes about the value of the property stolen constitute “prima facie evidence of value for purposes of restitution.” [Citations.]’” (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690.) “Were the law otherwise, a victim in a case such as this would be without a means for recovery. A victim who has no receipts or appraisals for property received by gift, and who no longer has possession of the property, may have no way of providing a detailed description or obtaining an appraisal. . . . If the thief has disposed of the property and is,

like the victim, ill poised to provide a detailed description or an appraisal, it is indeed awkward. [Because] the situation is one of the thief's own making, and as between the victim and the thief, the equities favor the victim." (*Id.* at p. 691.)

Here, at the restitution hearing, the probation officer testified that she recommended \$750,192 in restitution based upon information Johnson had provided. Johnson was an experienced gem collector and a retired master jeweler. He testified that within his safe deposit box he had kept numerous items including jewelry, diamonds, emeralds, sapphires, and gold.

Johnson presented a list of 17 categories of items he kept in the safe deposit box and he had the list valued by professional appraisers. Based on his own training and experience, he agreed with the valuations. Of the total loss, \$500,000 was attributable to 1,000 carats of Yogo Natural Sapphires, which Johnson described as "the world's finest" sapphires. An appraiser also testified at the hearing, and both parties stipulated to his expertise. The appraiser was familiar with Johnson and testified that he had seen the sapphires some 20 years earlier. The appraiser described the sapphires as "triple A quality" and estimated their value at \$400 a carat if sold in bulk, but he also testified that their value could be as much as \$1,500 a carat if sold individually (\$400,000 to \$1.5 million).

The trial court found Johnson to be a "very credible" witness. Although Johnson had placed the value of the sapphires at a lower amount when he first spoke to the police (he later said that he and his wife were "devastated" at the time), the court found that the \$500,000 estimate was conservative, primarily based on the testimony of the expert witness. The court said of the sapphires: "It's possible that if they were sold in bulk, as the witness indicated, they could be sold for as little as \$400,000, but if sold individually, they could be sold for a lot more, frankly, millions and millions of dollars. And so I think the \$500,000 estimate very close to the low end is very conservative and very appropriate." The court also noted that Pando had not presented any evidence to

challenge the appraisals. At the conclusion of the hearing, the court signed an order setting the amount of restitution at \$750,192.

We find that the \$750,192 award was plainly supported by substantial evidence. Not only did the trial court hear testimony concerning the value of the stolen property from the victim Johnson, who happened to be an expert gemologist, but the court also heard the testimony of an expert appraiser as well. Moreover, the testimony of both gentlemen essentially went unchallenged.

Pando is correct that the jury did not find true a sentencing allegation that the value of the stolen property exceeded \$200,000. (§ 12022.6, subd. (a)(2).) But the jury did not hear the additional testimony of the expert appraiser. Further, the prosecution's burden of proof at trial was beyond reasonable doubt, while the prosecution's burden of proof at the restitution hearing was by a preponderance of the evidence. (See *People v. Jessee*, *supra*, 222 Cal.App.4th at pp. 506-507; see also *People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1463 ["collateral estoppel does not apply where the two proceedings at issue have different burdens of proof"].) In sum, the trial court did not abuse its discretion when it found that it was more probable than not that the value of Johnson's stolen property was \$750,192.

B. Bank of the West Should Not Have Been Included in the Restitution Award

"It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime." (§ 1202.4, subd. (a)(1).) A "victim" includes: "A corporation, business . . . or any other legal or commercial entity when that entity is a *direct victim* of a crime." (§ 1202.4, subd. (k)(2), italics added.) A "direct victim" is a victim against whom a defendant has committed a crime. (*People v. Anderson* (2010) 50 Cal.4th 19, 28.) Whether an entity is a "direct victim" is a legal question, subject to de novo review. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.)

A third party who reimburses the victim of a crime for economic losses is ordinarily not a “direct victim” within the meaning of restitution. (*People v. Birkett* (1999) 21 Cal.4th 226 (*Birkett*).) In *Birkett*, the defendant pleaded guilty to auto theft and related crimes. He agreed to pay restitution to the auto theft victims as a condition of probation in amounts to be determined. (*Id.* at p. 229.) At the restitution hearing, the evidence disclosed that the victims had been partially reimbursed by their insurers. (*Id.* at pp. 229-230.) In its restitution order, the trial court awarded money to both the victims and the insurance companies. (*Id.* at p. 230.) The California Supreme Court disapproved of the restitution payments to the insurance companies. (*Ibid.*)

The Supreme Court held in *Birkett* that “only ‘direct’ crime victims and their immediate families” had a right to restitution and “persons whose losses arose only as a result of crimes committed against others” had no such entitlement. (*Birkett, supra*, 21 Cal.4th at p. 243.) A court’s discretion to order restitution as a condition of probation did not permit it to “divert mandatory restitutionary awards from insureds to insurers,” because “the Legislature intended to require a probationary offender, for rehabilitative and deterrent purposes, to make *full* restitution for all losses *his crime had caused, and* that such reparation should go entirely to *the individual or entity the offender had directly wronged*, regardless of that victim’s reimbursement from other sources.” (*Id.* at pp. 229, 246.) However, the court recognized that third parties “who had already reimbursed the victim” may be entitled to separate civil remedies. (*Ibid.*)

Here, just as the automobile insurance companies in *Birkett* were not the direct victims of that defendant’s auto thefts, Bank of the West was not a direct victim of Pando’s property theft. Similar to an insurer, Johnson testified that Bank of the West had “reimbursed” him for part of his loss. Johnson said that he had not hired an attorney or filed a lawsuit, nor had he threatened to file a lawsuit. So in this case, it is unclear from the record whether the bank’s \$400,000 reimbursement was the result of some sort of indemnification agreement, its good graces, or whether it was attempting to forestall

awkward publicity regarding its “safe” deposit boxes. But it is of no consequence. The bank merely reimbursed Johnson for his loss and is therefore not a “direct victim” entitled to restitution, though it may have some available civil remedies.

The Attorney General relies on *People v. Saint-Amans* (2005) 131 Cal.App.4th 1076, 1082 (*Saint-Amans*), in support of her position that Bank of the West is also a “direct victim” of Pando’s crime, which she mistakenly identifies as burglary. But her reliance on *Saint-Amans* is misplaced. In *Saint-Amans*, defendant entered a bank, opened a fraudulent account, and through a series of transactions, transferred money from another customer’s account to his own. (*Id.* at pp. 1079-1080.) The bank reimbursed its customer for his loss and the trial court ordered defendant to pay restitution to the bank. (*Id.* at p. 1088.) The appellate court agreed. The court found that unlike the insurance company in *Birkett*, the bank in this case was, in fact, a “direct victim” of the defendant’s crime: commercial burglary. The court held that the defendant “committed his crime against the entity claiming restitution. The object of appellant’s crime was to enter the bank and make fraudulent withdrawals of funds managed by the bank. Thus, the object of appellant’s crime was to commit fraud against the bank.” (*Id.* at p. 1087.)

In this case, Pando was convicted of unlawfully taking personal property belonging to Johnson (grand theft); Pando was not convicted of burglarizing Bank of the West. That is, the holder of the safe deposit box (who happened to be Johnson), was the target of Pando’s crime, not Bank of the West. Further, the bank had not appeared at the restitution hearings and was apparently not seeking any restitution from Pando. Thus, in this situation, unlike *Saint-Amans*, the bank is not a “direct victim” of a crime that is entitled to victim restitution.

III

DISPOSITION

The \$750,192 restitution order is affirmed. The trial court is directed to modify the award so that Pando will be ordered to pay the entire amount to Johnson.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.